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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 467.

BENNETT MEYERS, *Petitioner,*

—against—

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

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We wish to direct the Court's attention to some of the more flagrant errors in the Government's brief in opposition to our petition for certiorari.

1. As to the Inapplicability of the District of Columbia Perjury Statute.

After reluctantly conceding that petitioner is right in his contention that the crime for which he was indicted is not within the local perjury statute, the Government purports to argue (Brief, p. 11, fn. 4) that the point was not before the trial judge. This specious suggestion is immediately disposed of by reference to the record. On petitioner's preliminary motion to dismiss the indictment the trial court

flatly holds that the local statute applies (R. 9). Likewise the point was specifically before the court on the question of a judgment of acquittal and when sentence was imposed (R. 391). The Court of Appeals recognized that the issue had been raised (R. 568). See also opinion of Court of Appeals in *Christoffel* v. *United States*, No. 9788, decided Nov. 22, 1948, wherein it cites its opinion in the Meyers case as authority for the proposition that the local statute is applicable in such a case.

It was obviously unnecessary to print a record of greater length on the raising of an issue which had never been denied below. For the Government now to suggest that the point was not raised is an attempt to make an unconscionable use of the rules which encourage the printing of parts only of the record so as to eliminate non-controversial matter.

The treatment of this point since the beginning of the case is characteristic also of the vicissitudes of petitioner's efforts to secure a correct adjudication of the legal principles applicable to his case. Here, the trial judge brushed aside the point that the petitioner had been indicted under the wrong statute, taking care, however, to impose a sentence no more severe than the maximum provided under the right statute. The Court of Appeals was not willing to say that petitioner was wrong in contending that the local statute is inapplicable, but felt constrained to say (erroneously) that it was required by its own decisions to persist in the opposite view. We now come to the Supreme Court and find the Government forced to concede that petitioner has been right throughout, but attempting to turn the point aside by the false suggestion that the point was not raised below.

There is also a reference in this connection (Government's brief, p. 11, fn. 3) to Rule 7-c of the Federal Rules of Criminal Procedure relating to errors in the citation in the indictment of the statute which the defendant is alleged

to have violated. The rule has no bearing whatever upon the problem here involved. There was no error in the indictment in the citation of the statute under which petitioner was indicted. The indictment correctly cited the statute under which the Government intended to and did indict petitioner. The whole point here is that the facts alleged in the indictment, being a matter of national concern, do not constitute an offense under that statute.

2. As to the Subcommittee.

The Government argues (Brief, pp. 11-12) that the Court of Appeals was wrong in agreeing with petitioner that, because only two of the five members were present, there was less than a quorum of the subcommittee present on October 6, 1947. The suggestion is that two members might have been a quorum since under the standing rules of the Senate, standing committees may fix for themselves the number to constitute a quorum provided it is not less than one-third of the entire membership.

This is a completely mistaken reference. The committee here involved, the Senate War Investigating Committee, was not a standing committee. It was a special or select committee, as the indictment specifically alleges (R. 2). The Government calls attention to no special rule regulating quorums of special committees or subcommittees thereof and it is well recognized that in the absence of a special rule, a majority of the body is necessary to constitute a quorum. (4 *Hinds' Precedents,* §§ 4540, 4552, 4686; Jefferson's *Manual,* § XXVI; Elsynge's *Method of Passing Bills,* p. 11.)

The fact that there is no basis for supposing that two members of the subcommittee might under any circumstances have been sufficient to constitute a quorum at the purported session of October 6, 1947, is sufficient to dispose of the Government's remarkable suggestion (Brief, p. 12)—apparently another innovation especially designed to apply to this petitioner—that the burden of proof was

upon the defendant with respect to this issue in *this* criminal trial.

With respect to the question whether the Senate War Investigating Committee continued to be a ten-man committee after the commencement of the 78th Congress, the Government urges that the committee, as originally created in the 77th Congress, was authorized to sit during succeeding Congresses. The Government claims (Brief, p. 13, fn. 7) that it can find nothing in the *Sinclair* case to indicate that Congress has no power to create such a continuing committee. Reference to the *Sinclair* case will disclose that the Court specifically adverted to the point, saying (p. 295):

> "Resolution 282 and 294 were sufficient until the expiration of the 67th Congress during which they were adopted, * * *"

The Court then went on to point out that Resolution 434 of the next Congress was sufficient to continue the power of the committee. The Court not only stated but clearly supposed throughout that a congressional committee may not be authorized to act beyond the commencement of the next succeeding Congress. Indeed, the precedents are clear to that effect. (4 *Hinds' Precedents*, §§ 4394, 4420, 4541, 4545). There is a difference between the Senate and the House in that the Senate, as a continuing body, may authorize one of its committees to act after the expiration of the Congress during which it was created, but only during the recess. At the commencement of the next Congress, a new authorization is necessary (*McGrain* v. *Daugherty*, 273 U. S. 135, 180-2; 4 *Hinds' Precedents*, § 4544).

With respect to the creation of the subcommittee, the Government argues (Brief, p. 14) that there was evidence that the full committee had authorized the chairman to appoint subcommittees. The portions of the record there referred to show conclusively that there was no such evidence. The witness Rogers, who first became connected with the committee in April, 1947, attempted to state in

general terms that there had been some oral authorization to that effect in 1941 but when this type of testimony was objected to and the witness was pressed to show what the actual fact was, he was wholly unable to do so. As he admitted (R. 46):

> "I probably shouldn't have said that. I understand that is a fact, but I wasn't there at the time."

Moreover, Senator Brewster, the chairman of the committee, claimed no such authorization. On the contrary, he made it perfectly clear that in appointing the subcommittee, he had not purported to act on the basis of any authorization by the full committee (R. 82).

Of course, even proof that the full committee had authorized the chairman to create subcommittees would not help the Government in view of the well established principle that the delegation of authority which is effected by the appointment of a subcommittee can be made only by the body which possessed the authority, namely, the full committee. (See authorities collected in our main petition, pp. 34-6).

The record references given by the Government (Brief, p. 14) in support of the statement that it was an invariable Senate custom for committee chairmen to appoint subcommittees without any committee action show no more than that Senator Brewster indulged in the practice and considered it usual. The only indication of the actions of other committees and chairmen is Senator Brewster's testimony (R. 93) that he had been appointed to subcommittees by the chairmen of Senate committees without, so far as he knew, any committee action. But all that Senator Brewster could know in any case was that the chairman had named him as a member of a subcommittee. It is, indeed, customary practice for chairmen to name the members of subcommittees after the subcommittee has been created. Cushing's *Manual of Parliamentary Practice* [Bolles' Ed. 1928], Ch. XV, § II, pars. 263-6; Robert's,

Rules of Order [1943] § 32, p. 128). The creation of the subcommittee, however, is committee business which can be done only by the whole committee at a formal meeting. (4 *Hinds' Precedents*, §§ 4540, 4583-6; 8 Cannon's *Precedents*, § 2209-11; Cushing's *Manual*, Ch. XV, § V, par. 306; Robert's *Rules of Order* [1943] § 52, pp. 212, 217-8; Fish, *American Manual of Parliamentary Law* [1879] § 194[f]; Burleigh, *Legislative Guide* (1861) p. 236). The opposition brief concludes its discussion of this point with the astonishing suggestion that the question whether the subcommittee was validly created may not touch petitioner's fundamental rights. It is hardly necessary to state that the fundamental right here violated was the right not to be indicted and convicted of suborning alleged perjury committed before a purported subcommittee which was in fact a nullity, when the perjury statute makes the competency of the tribunal an essential element of the crime.

3. Sufficiency of the Evidence.

In attempting to defend the trial court's action in permitting the witness Rogers to testify to a summation of Lamarre's testimony before the alleged subcommittee, the Government asserts (Brief, p. 21):

> "A reading of Rogers summations demonstrates that they were an accurate statement of the substance of Lamarre's testimony."

This simply is not so. As Judge Prettyman in his careful analysis of this testimony and outrageous procedure puts it:

> "It is obvious that what the witness gave as 'substance' was an essence of his own distillation and not an attempt to reproduce the whole of Lamarre's testimony. *There are differences between Rogers recollection and the transcript which are vital in the case.* (Italics ours) (R. 572)

No amount of assertion by either side can alter these facts. Judge Prettyman had read the record.

The Government's brief also contains numerous subtle attempts to deprive petitioner of the benefit of the presumption of innocence. For example, it is said on p. 15, "Petitioner does not deny that Lamarre, at his behest, lied to the committee." *Of course,* petitioner denies that Lamarre, at his behest, lied to the subcommittee. Petitioner pleaded "not guilty" to this indictment, thereby placing in issue as between the Government and himself, every essential allegation in it. The above quoted sentence is an illustration of the subtle attempts encountered by this petitioner in the courts below to deprive him of the presumption of innocence and to make it appear that the exercise of his right not to take the witness stand in the absence of proof of essential elements of the charge against him amounted to tacit admission of guilt in some particulars. As a part of the same fabric appear similar statements in the opposition brief (pp. 7, 8, and 9) to the effect that "At the trial Lamarre *admitted* that his testimony before the subcommittee was false".

What testimony was false? The transcript of Lamarre's testimony showed that he had not testified as alleged in the indictment, the charge that this petitioner was called upon to meet. Placed upon the witness stand, as the Government's principal witness after Rogers, and before the transcript of his testimony had been introduced, Lamarre was permitted to state that he had testified falsely in numerous unidentified respects. The trial judge left it to the jury that if Lamarre had testified falsely "in other respects" the jury could, and in fact should, find the petitioner guilty of having suborned the unspecified perjury. These statements in the brief, showing the pattern of treatment accorded petitioner in the courts below, illustrate in the clearest possible manner how petitioner was deprived of his fundamental right to a fair and impartial trial and why the writ herein sought should be granted.

4. As to the Matter of Prejudicial Error in the Conduct of the Trial.

The opposition brief (p. 21) adopts the convenient method followed by the majority opinion of the Court of Appeals—of virtually ignoring the point—and the opinion of this Court in the *Viereck* case.

The fact remains that the Court of Appeals decision failed to give proper application to a decision of this Court relative to the fundamental right to a fair trial (*Viereck* v. *United States*, 318 U. S. 230). This fact alone, if there were no other, is sufficient reason for granting this writ.

Respectfully submitted,

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